



January 11, 2001

Mr. Neal J. Iverson  
Iverson & Norwood  
P.O. Box 759  
Dayton, Texas 77535

OR2001-0123

Dear Mr. Iverson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143111.

The City of Dayton (the "city") received a request for information relating to Mr. Sam Barrington ("Mr. Barrington"), a former city manager. You inform us that you have released a majority of the information responsive to the request, but claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.102 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses confidentiality provisions such section 159.002 of the Occupations Code, known as the Medical Practices Act ("MPA"). The MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). Upon review of the submitted information, we conclude that pages one and two of Exhibit C are medical records subject to the MPA, and they may be released only in accordance with that statute.

We next address your argument that pages three and four of Exhibit C are confidential under a common law or constitutional right of privacy. As noted, section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision, and incorporates the doctrine of common law privacy. For information to be protected from public disclosure under the common law right of privacy, the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). You also raise section 552.102, which protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The protection of section 552.102 is the same as that of the common law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref’d n.r.e.). Consequently, we will consider these two exceptions together.

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683; *see also* Open Records Decision Nos. 470 (1987) (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/ seizures, or emotional/mental distress is protected by common law privacy). The constitutional right to privacy protects the interests in (1) independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court; and (2) avoiding disclosure of personal matters. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)); *see* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)).

Upon review of the information contained in pages three and four of Exhibit C, we conclude that none of this information is protected by common law or constitutional privacy. Though some of the information contained in Exhibit C may be intimate and embarrassing, we believe there is a legitimate public interest in its disclosure. The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision Nos. 423 (1984) at 2 (scope of public employee privacy is narrow), 208 (1978) (disciplinary action against public employee available to public). As you raise no other exceptions to disclosure of this information, it must be released to the requestor.

Finally, you inform us that all of the information in Exhibit D has been released to the requestor except for Mr. Barrington's social security number. You argue that the social security number is excepted from disclosure under section 552.117. Section 552.117(1) of the Government Code requires that the city withhold its employees' and former employees' home addresses, telephone numbers, and social security numbers, and information that reveals whether the employee or former employee has family members, but only to the extent that the employees and former employees have elected to keep this information confidential in compliance with section 552.024. *See* Open Records Decision No. 530 (1989) (employee must make election prior to receipt of open records request). You argue that as Mr. Barrington separated from employment with the city in 1989, and that as section 552.024 became effective on September 1, 1993, Mr. Barrington did not have a chance to comply with section 552.024. In other words, he did not have an opportunity to make the election to keep the number confidential as provided by section 552.024, and therefore it should be withheld from disclosure under section 552.117. We disagree. In Open Records Decision No. 488 (1988), this office found that the home addresses and telephone numbers of city retirees who were not peace officers and who retired prior to the effective date of the predecessor to section 552.024 may not be withheld under the predecessor to section 552.117 of the Act. We similarly believe that the social security number of a governmental employee whose employment with a governmental body ended before the effective date of the amendment to section 552.024, which added social security numbers to the list of information that a governmental employee may elect to have withheld, may not now be withheld under section 552.117.

We note, however, that a social security number is excepted from required public disclosure under section 552.101 of the Act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Although the social security number at issue relates to an employee whose employment ended before October 1, 1990, we note that the federal statute provides that the *law* requiring the maintenance of the employee's social security number must have been enacted on or after October 1, 1990. In other words, the fact that the social security number was obtained before or after October 1, 1990 by itself does

not dispose of the issue. Based on the information you have provided, we are unable to determine whether the social security number at issue is confidential under this federal statute. We note, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information.

To summarize, the city may release pages one and two of Exhibit C only in accordance with the MPA. None of the submitted information may be withheld under common law or constitutional privacy. The social security number at issue may be withheld only if it was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 143111

Encl. Submitted documents

cc: Ms. Patrina A. Bostic  
Beaumont Enterprises  
P.O. Box 3071  
Beaumont, Texas 77704  
(w/o enclosures)